

No. 77-1699

Supreme Court, U. S.

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In the Supreme Court of the United States

OCTOBER TERM, 1978

MICHAEL R. DIEM, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT*

**MEMORANDUM FOR THE RESPONDENTS
IN OPPOSITION**

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner seeks review of the decision below ordering the enforcement of internal revenue summonses issued to several financial institutions. The summonses required production of records of petitioner's financial transactions.

The pertinent facts are as follows: In February 1977, Special Agent Robert E. Ross began an investigation of petitioner's income tax returns for 1973 through 1976. Between April and September 1977, Ross issued five summonses to three financial institutions seeking production of records concerning petitioner's transactions. After the summoned parties failed to comply, the government filed petitions in the United States District Court for the Southern District of New York seeking enforcement of the summonses pursuant to 26 U.S.C. 7604 (Pet. 3; Ross Affidavit, p. 2; Ross Supplemental Affidavit, p. 2).

In the enforcement proceeding, the government filed affidavits of Special Agent Ross stating that he was conducting an investigation of petitioner's tax returns for 1973 through 1976, and that the summoned records, which were not in the Internal Revenue Service's possession, were pertinent to his investigation. Petitioner intervened and opposed the enforcement of the summonses on the ground, *inter alia*, that the summonses had been issued solely in furtherance of a criminal investigation. Petitioner requested permission from the district court to examine materials in the investigative file and sought an evidentiary hearing to explore the purposes of the investigation. In an affidavit, petitioner alleged that his attorney offered to provide the summoned records if assurances were given that they would be used solely to determine his civil tax liabilities. Petitioner's affidavit further alleged that Agent Ross stated that his only interest was in determining whether petitioner had committed criminal tax fraud (Pet. 3-5).

By supplemental affidavit, Special Agent Ross replied as follows: that in April 1977, he had informed petitioner that his responsibility was to determine whether the facts warranted a criminal prosecution; that in July 1977, a revenue agent from the Audit Division was assigned to the investigation; that the investigation was aimed at determining whether petitioner should be prosecuted and/or subjected to additional civil tax liabilities; and that a determination whether to recommend prosecution or the assertion of civil liabilities had not been made (Ross Supplemental Affidavit, pp. 3-4).

On March 8, 1978, after hearing argument, the district court ordered enforcement of the summonses (Order, March 8, 1978). On April 4, 1978, the district court granted petitioner's motion for a stay for three days to allow him to apply for a stay from the court of appeals

pending appeal. In granting the limited stay, the court pointed out that petitioner had "made no attempt to show that the summons was issue [*sic*] for the sole purpose of obtaining evidence for use in a criminal prosecution." The court noted that the sworn statement by Agent Ross that the summonses were issued for both civil and criminal purposes was uncontested (Letter order, April 4, 1978, p. 1). On April 20, 1978, the court of appeals denied petitioner's motion for a stay and affirmed the district court's enforcement order (Pet. App. 1a). On May 5, 1978, Mr. Justice Marshall granted a stay pending this Court's decision in *United States v. LaSalle National Bank*, No. 77-365, decided June 19, 1978 (Pet. App. 2a). On July 3, 1978, Mr. Justice Marshall denied petitioner's application for a further stay pending disposition of his petition.

ARGUMENT

In *United States v. LaSalle National Bank*, *supra*, the Court held that the primary requirement for the enforcement of an internal revenue summons under 26 U.S.C. 7602 is that it be issued before the Internal Revenue Service recommends to the Department of Justice the initiation of a criminal prosecution relating to the subject matter of the summons. The Court further ruled that enforcement of a summons is also conditioned upon the good faith use of the summons authority by the Internal Revenue Service, which must not abandon its institutional responsibility to determine and collect taxes and civil fraud penalties. As the Court stated, "this means that those opposing enforcement of a summons do bear the burden to disprove the actual existence of a valid civil tax determination or collection purpose by the Service" (slip op. 18). The Court characterized the burden as "a heavy one"; "[b]ecause criminal and civil fraud liabilities are coterminous, the Service rarely will be found to have acted in bad faith by pursuing the former" (*ibid.*).

Here, the special agent's and petitioner's affidavits amply supported the district court's finding that petitioner had "made no attempt to show that the summons was issue [sic] for the sole purpose of obtaining evidence for use in a criminal prosecution" (Letter order, April 4, 1978, p. 1). Indeed, the court observed that Agent Ross' sworn statement that the summonses were issued for both civil and criminal purposes was uncontested (*ibid.*). Moreover, the dual character of the investigation is further demonstrated here by the fact that a revenue agent, whose function is to determine civil tax liability, is assigned to the case. Finally, the agent swore that there has been no determination whether to recommend criminal prosecution or the assessment of additional civil liabilities (Ross Supplemental Affidavit, pp. 3-4). Therefore, petitioner has not met his burden of proving that the Internal Revenue Service has abandoned its institutional responsibility to determine and collect taxes. Under *LaSalle National Bank*, there is no basis for petitioner's claim (Pet. 7) that he made a sufficient showing of bad faith by Agent Ross to warrant an evidentiary hearing and discovery as to the purposes of the summonses.

Nor has petitioner alleged any harassment or other improper purpose for the summonses that might justify an evidentiary hearing. *United States v. Powell*, 379 U.S. 48, 57-58; *United States v. LaSalle National Bank*, *supra*, slip op. 15; cf. *United States v. Church of Scientology of California*, 520 F. 2d 818 (C.A. 9); *United States v. McCarthy*, 514 F. 2d 368 (C.A. 3); *United States v. Salter*, 432 F. 2d 697 (C.A. 1). Here, the only fact alleged by petitioner is that Special Agent Ross stated that his only interest was in determining whether petitioner committed criminal tax fraud. But as this Court pointed out in *LaSalle National Bank*, "the inquiry into the criminal enforcement objectives of the agent would delay summons

enforcement proceedings while parties clash over, and judges grapple with, the thought processes of each investigator" (footnote omitted) (slip op. 17) -- a process the Court characterized as "undesirable and unrewarding" (slip op. 18). Petitioner has therefore alleged no fact that would disprove the existence of a valid civil tax determination or collection purpose by the Internal Revenue Service. There is accordingly no basis for an evidentiary hearing.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

JULY 1978.